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In the Supreme Court of the United States

DAVID JENNINGS, ET AL.,

PETITIONERS,

v.

ALEJANDRO RODRIGUEZ, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Office of the United Nations High Commissioner for Refugees (UNHCR) is the organization entrusted by the United Nations General Assembly with responsibility, alongside governments, for providing international protection to refugees and other persons of concern, and for

[1] The parties have consented to the filing of this brief, and their consent letters are on file with the Clerk of Court. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no one other than amicus curiae and its counsel made any such monetary contribution.

seeking permanent solutions to refugees' problems.[2] G.A. Res. 428 (V), Annex, Statute of the Office of the UNHCR ¶ 1 (Dec. 14, 1950). UNHCR fulfils its mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." *Id.* ¶ 8(a). UNHCR's supervisory responsibility is also reflected in the Preamble and Article 35 of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (*1951 Convention*), and Article 2 of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (*1967 Protocol*), obligating States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

UNHCR has won two Nobel Peace Prizes for its work caring for people affected by forced displacement. There are 65.3 million such people in the world today. The views of UNHCR are informed by more than six decades of experience supervising the treaty-based system for refugee protection. UNHCR's interpretation of the *1951 Convention* and the *1967 Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees and others of concern. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretive guidelines on the application of international law, including the *1951 Convention* and the *1967 Protocol*, to refugees and asylum-seekers.

UNHCR has long been concerned with the legality of the detention of asylum-seekers. *See, e.g.*, UNHCR Exec. Comm., *Detention of Refugees and Asylum-Seekers*, No.

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[2] Persons of concern to UNHCR include refugees, asylum-seekers, refugees returning to their homes, stateless persons, and internally displaced persons. *See* UNHCR, Who We Help, http://www.unhcr.org/en-us/who-we-help.html (last visited October 21, 2016).

44 (XXXVII), U.N. Doc. A/41/12/Add.1 (Oct. 13, 1986); UNHCR Exec. Comm., *Conclusion on International Protection*, No. 85 (XLIX), U.N. Doc. A/53/12/Add.1 (Oct. 9, 1998). In 1999, UNHCR issued the *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, which were superseded in 2012 by the *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (*2012 Detention Guidelines*). The *2012 Detention Guidelines* reflect the current state of international law on the detention of asylum-seekers.

Given UNHCR's long engagement on the legality of the detention of asylum-seekers, it has a specific interest in this matter. As discussed below, this Court should consider the United States' obligations to asylum-seekers under international law in construing the provisions of the Immigration and Nationality Act at issue in this case. UNHCR presents its views on the international law principles governing the detention of asylum-seekers to assist the Court in construing the Act.

SUMMARY OF ARGUMENT

International law obligates States to protect the human rights of persons fleeing persecution. At the core of this case is the United States' obligation to protect individuals, including asylum-seekers, from arbitrary detention. This Court should construe the Immigration and Nationality Act consistently with this obligation.

I. The United States is party to international instruments governing detention of asylum-seekers, including the United Nations Protocol Relating to the Status of Refugees, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

UNHCR has supervisory authority for construing States' obligations under the Protocol and the United Nations Convention Relating to the Status of Refugees incorporated therein and has issued authoritative guidance on States' international law obligations to protect refugees and asylum-seekers. In interpreting the statutes at issue in this case, all of which implicate the rights of asylum-seekers, this Court should consider these obligations, as reflected in UNHCR's interpretive guidance.

II. The court of appeals' holding that bond hearings must be provided in cases of prolonged detention is consistent with international law. Under international law, States cannot subject asylum-seekers to arbitrary detention. Although States may detain asylum-seekers in some cases, they may do so only for a legitimate purpose and only if detention is necessary, reasonable, and proportionate in a given case. Assessments regarding the legality of detention must be made by independent decision-makers and not by the detaining authorities. These principles apply with equal force to *all* asylum-seekers, regardless of whether they are detained at the border or inside the country.

III. The procedural safeguards required by the court of appeals in connection with bond hearings correspond with international law. To protect asylum-seekers against arbitrary detention, States bear the burden to justify the legality of an asylum-seeker's detention; States must provide automatic, periodic review of the necessity for the continuation of detention; and a judge must necessarily take into account the accrued length of detention in assessing its legality.

IV. Finally, UNHCR emphasizes that prolonged detention impedes access to asylum and magnifies the risk that individuals with bona fide claims to refugee status

will abandon their claims, thus undermining the United States' compliance with the principle of *non-refoulement*, which requires States to refrain from returning refugees to countries where they will face persecution or a reasonable possibility of serious harm.

ARGUMENT

I. The Immigration and Nationality Act Should Be Interpreted Consistently with the International Law Principles Governing Detention of Asylum-Seekers

The United States has bound itself to international instruments that govern the detention of asylum-seekers. In deciding the questions presented by this case, this Court must construe the applicable statutes consistently with the United States' international law obligations to asylum-seekers to the fullest extent possible. In doing so, it should consider UNHCR's authoritative guidance on the state of international law as it relates to detention of asylum-seekers.

A. The United States Is Party to International Instruments That Govern Detention of Asylum-Seekers

1. The United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (*1951 Convention*) and the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (*1967 Protocol*) are the key international instruments that govern the legal obligations of States to protect refugees. The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention*. *1967 Protocol* art. 1, ¶¶ 1–2. The *1967 Protocol* universalizes the refugee definition in Article 1 of the

1951 Convention, removing the geographical and temporal limitations. *Id.* ¶¶ 2–3. Under the *1951 Convention* and *1967 Protocol*, a refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." *1951 Convention* art. 1, ¶ A(2); *1967 Protocol* art. 1, ¶¶ 2–3.

The core of the *1951 Convention* and *1967 Protocol* is the obligation of States to safeguard the principle of *non-refoulement*, which is the obligation not to return a refugee to any country where he or she faces persecution or a reasonable possibility of serious harm. *1951 Convention* art. 33, ¶ 1. The obligation to safeguard against *refoulement* applies to all refugees, regardless of whether the individual has been formally recognized as a refugee. *See* UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* ¶ 28, U.N. Doc. HCR/1P/4/ENG/REV.3 (Dec. 2011) ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition.").

As particularly relevant here, Article 31 of the *1951 Convention* forbids States from restricting the movement of or imposing penalties on persons seeking asylum. *1951 Convention* art. 31. Prolonged detention of asylum-seekers absent sufficient justification or basic procedural safeguards rises impermissibly to the level of a penalty under Article 31. *See* Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection*, *in* Refugee Protection in International Law 185, 195–96 (Erika Feller, et al. eds. 2003); *see also* UNHCR Exec. Comm., *Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII), U.N.

Doc. A/41/12/Add.1 (Oct. 13, 1986) [hereinafter "UNHCR Conclusion No. 44"].

The United States acceded to the *1967 Protocol* in 1968, *see* 19 U.S.T. 6223, thereby binding itself to the international refugee protection regime contained in the *1951 Convention*. Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, which amends the Immigration and Nationality Act (INA), expressly to "bring United States refugee law into conformance with the [*1967 Protocol*]." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987); *see also Negusie* v. *Holder*, 555 U.S. 511, 537 (2009).

2. The United States is also party to other instruments that speak to detention of asylum-seekers. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) guarantees all persons "the right to liberty and security of person" and prohibits "arbitrary arrest or detention." ICCPR art. 9, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171. Article 9 further provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." *Id.* art. 9, ¶ 4. The United States ratified the ICCPR in 1992. *See* 138 Cong. Rec. 8070 (1992).

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) similarly obligates States to "prevent in any territory under [their] jurisdiction . . . acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." Convention against Torture art. 16, ¶ 1, Dec. 10, 1984, 1465 U.N.T.S. 85. The U.N. Committee against Torture has construed the Convention to require that "detainees and persons at risk of torture

and ill-treatment" have access to "judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment." U.N. Committee against Torture, General Comment No. 2, *Implementation of Article 2 by States Parties* ¶ 13, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). The United States acceded to the Convention against Torture in 1994. *See* U.N. Depositary Notification C.N.382.1994. TREATIES-6 (1995).

B. UNHCR Has Supervisory Responsibility for Implementation of the Refugee Law Instruments and the Human Rights Protections Embedded Therein

1. As discussed above, UNHCR is responsible for supervising the implementation of the *1951 Convention* and the *1967 Protocol*. *See supra* p.2. In exercising its supervisory responsibility to protect refugees, UNHCR looks to international human rights law to inform the substance of that protection. The preamble to the *1951 Convention* embeds the *Convention* within a broader human rights framework. *See 1951 Convention* at 1. UNHCR's governing body, the Executive Committee (of which the United States has been a member since 1959), has recognized that

> refugee law is a dynamic body of law based on the obligations of State Parties to the 1951 Convention and its 1967 Protocol . . . and which is informed by the object and purpose of these instruments and by developments in related areas of international law, such as human rights and international humanitarian law bearing directly on refugee protection . . . .

UNHCR Exec. Comm., *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, No. 103 (LVI), U.N. Doc. A/AC.96/1021 (Oct. 7, 2005); *see also* UNHCR, *Note on International Protection* ¶ 32, U.N. Doc. A/AC.96/930 (July 7, 2000).

2. UNHCR has issued considerable guidance to clarify States' obligations to refugees and asylum-seekers under international law. UNHCR's guidance draws on international refugee law and human rights principles indicated by the *1951 Convention* and the *1967 Protocol*. These principles include the fundamental protection against arbitrary deprivation of liberty recognized by the international community in the ICCPR and Convention against Torture, as well as more than sixty years of jurisprudence and United Nations interpretation of human rights instruments.

UNHCR has repeatedly addressed States' obligations to refugees and asylum-seekers with respect to the issue of detention. UNHCR's Executive Committee addressed this issue in particular detail in 1985. Invoking Article 31 of the *1951 Convention*, the Executive Committee expressed its "deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures," and adopted the position that detention of asylum-seekers should ordinarily be avoided. UNHCR Conclusion No. 44. More recently, the Executive Committee stated that it

> [d]eplores that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR

> and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.

UNHCR Exec. Comm., *Conclusion on International Protection*, No. 85 (XLIX), U.N. Doc. A/53/12/Add.1 (Oct. 9, 1998).[3]

In 1999, UNHCR issued the *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, which were superseded in 2012 by the *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (*2012 Detention Guidelines*). The *2012 Detention Guidelines* "reflect the current state of international law" regarding detention of asylum-seekers. *2012 Detention Guidelines* ¶ 1. They are intended to provide authoritative guidance for governments in their elaboration and implementation of asylum and migration policies that involve detention, and for decision-makers, including judges, in assessing the necessity of detention in individual cases. *Id.*

As discussed in more detail below, the *2012 Detention Guidelines* address the situations in which detention of asylum-seekers is permitted under international law and the procedural safeguards that must be provided to ensure that detention is not arbitrary.

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[3] *See also* UNHCR Exec. Comm., *Expulsion*, No. 7 (XXVIII), U.N. Doc. A/32/12/Add.1 (Oct. 12, 1977); UNHCR Exec. Comm., *General Conclusion on International Protection*, No. 3 (XXVIII), U.N. Doc. A/32/12/Add.1 (Oct. 12, 1977).

C. The United States Should Construe the INA Consistently with Its International Law Obligations and UNHCR's *2012 Detention Guidelines*

1. Courts have a responsibility to construe federal statutes in a manner consistent with United States treaty obligations to the fullest extent possible. "It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .'" *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (omission in original); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained . . . by the courts . . . of appropriate jurisdiction . . . ."). This Court thus should construe the INA consistently with the United States' obligations under the *1967 Protocol* and other international treaties to which it is party, including the ICCPR and the Convention against Torture.

In construing statutes pertaining to immigration law, this Court has relied on UNHCR guidance to discern the United States' international law obligations to protect asylum-seekers. *See, e.g.*, *Negusie*, 555 U.S. at 536–37 (referring to UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, "to which the Court has looked for guidance in the past"); *Cardoza-Fonseca*, 480 U.S. at 438–39 (looking to the *Handbook* for guidance). As particularly relevant here, Members of this Court have drawn guidance from UNHCR's *Detention Guidelines* in particular. *See Zadvydas* v. *Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (referring to the *Detention Guidelines* in observing that "both removable

and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"); *Demore* v. *Kim*, 538 U.S. 510, 555 n.10 (2003) (Souter, J., dissenting) (relying on UNHCR's *Detention Guidelines*).

2. Drawing on international human rights and refugee law principles, as reflected in UNHCR's *2012 Detention Guidelines*, UNHCR offers the comments in this brief to guide the Court's construction of the statutes at issue. The questions before this Court implicate the rights of asylum-seekers in three distinct ways.

First, the Government asks this Court to reverse the court of appeals' holding that persons detained upon arrival under 8 U.S.C. § 1225(b) are entitled to bond hearings before an immigration judge after six months of detention. *See* Pet. App. 39a–45a; Petrs.' Br. 15–29. In the Government's view, members of the Section 1225(b) subclass must be detained indefinitely unless the detaining authority exercises its discretion to release them on parole. Petrs.' Br. 16–18. "The overwhelming majority" of the members of the Section 1225(b) subclass are "asylum seekers who have previously established a credible fear of persecution." Br. in Opp'n 3; *see also* Resps.' Br. 10. Two thirds of all subclass members ultimately were granted relief. Resps.' Br. 10. The court of appeals' holding with respect to the Section 1225(b) subclass thus unquestionably affects persons entitled to protection under the *1951 Convention* and *1967 Protocol*.

Second, the Government challenges the court of appeals' holding that persons detained pending removal under Section 1226(c) are entitled to bond hearings before an immigration judge after six months of detention. *See* Pet. App. 32a–38a; Petrs.' Br. 30–50. The Government asserts that members of the Section 1226(c) subclass must

be detained indefinitely unless the detaining authority determines that release is necessary for witness-protection purposes. *See* Petrs.' Br. 30–31. Section 1226(c) class members have applied for withholding of removal and/or withholding under the Convention against Torture. *See* J.A. 94, tbl. 22. All members of the Section 1226(c) subclass have, by necessity, been convicted of crimes, but many served short sentences for relatively minor offenses that do not exclude them from the protections granted to persons who qualify for asylum and/or withholding of removal. *See* Resps.' Br. 9 (citing J.A. 313–314); 8 U.S.C. §§ 1158(b)(2)(A)(ii) (barring asylum claims only for individuals convicted of "a particularly serious crime"), 1231(b)(3)(B) (barring withholding of removal only for individuals convicted of "a particularly serious crime" and sentenced to at least five years' imprisonment). Detention under Section 1226(c) thus implicates the United States' international law obligations to protect refugees and asylum-seekers.

Third, the Government objects to the court of appeals' holding with respect to procedural aspects of bond hearings provided to *all* class members, whether initially detained under Sections 1225(b), 1226(a), or 1226(c).[4] The court of appeals' holding thus affects the procedural protections available to detained asylum-seekers.

Because UNHCR's mandate is to protect the rights of refugees (including asylum-seekers), the focus of this

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[4] With respect to class members detained under Sections 1225(b) and 1226(c), the court of appeals held that, after six months of detention, the Government's authority to detain such class members shifts to Section 1226(a). Pet. App. 34a–35a, 40a–41a. As a result, the court of appeals' holding with respect to the procedural aspects of bond hearings provided under Section 1226(a) applies to all class members.

brief is asylum-seekers' right to be free from arbitrary detention. UNHCR's statements on this topic should not be viewed to suggest that others do not possess that right.[5] Because the statutes construed by the court of appeals implicate the rights of asylum-seekers, this Court must necessarily consider the United States' international law obligations to protect asylum-seekers in construing those statutes. *Cf. Clark* v. *Suarez Martinez*, 543 U.S. 371, 380–81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.").

II. The Court of Appeals' Interpretation of the INA To Require Independent Review of Detention Is Consistent with International Law

The court of appeals' holding in this case—which requires independent review of the legality of detention after six months of detention—is amply supported by international law. As reflected in the *2012 Detention Guidelines*, international law prohibits arbitrary detention of asylum-seekers. To protect against arbitrariness, a State may detain an asylum-seeker only where detention pursues a legitimate purpose and has been determined to be necessary, reasonable, and proportionate in each individual case. To ensure that States comply with these requirements, international law requires that States provide for

[5] The international law prohibition on arbitrary detention applies to all individuals, regardless of immigration status. *See* ICCPR art. 2, ¶ 1; *id.* art. 9.

review of the legality of detention by an independent decision-maker. Absent such review, detention of asylum-seekers violates international law.

A. International Law Prohibits Arbitrary Detention of Asylum-Seekers

1. It is a basic tenet of international human rights law that "[e]veryone has the right to liberty and security of person" and that "[n]o one shall be subjected to arbitrary arrest or detention." ICCPR art. 9, ¶ 1. This core principle is reflected in Article 9 of the ICCPR and the Universal Declaration of Human Rights. *See id.*; G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 9 (Dec. 10, 1948) [hereinafter "UDHR"] ("No one shall be subjected to arbitrary arrest, detention or exile."). The U.N. Human Rights Committee, the international body charged with interpreting the ICCPR, has specifically clarified that Article 9 of the ICCPR applies to refugees and asylum-seekers. U.N. Human Rights Committee, General Comment No. 35 ¶ 3, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter "UNHRC General Comment No. 35"]. The United States Government, as party to the ICCPR, is obligated to bring its law and practice in line with this principle of human rights law.[6]

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[6] Although the ICCPR is not self-executing and does "not itself create obligations enforceable in the federal courts," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 734–35 (2004), U.S. courts look to the ICCPR to determine important questions of human rights law, *see, e.g.*, *Roper* v. *Simmons*, 543 U.S. 551, 576 (2005) (referring to the ICCPR to support the prohibition on capital punishment for juveniles); *Abdullahi* v. *Pfizer, Inc.*, 562 F.3d 163, 176 (2d Cir. 2009) ("Agreements that are not self-executing or that have not been executed by federal legislation, including the ICCPR, are appropriately considered evidence of the current state of customary international law."); *Ma* v. *Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (relying on Article 9 of the ICCPR

Reiterating this unequivocal articulation of international law, the *2012 Detention Guidelines* state that the "fundamental human rights" to liberty and security of person "apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status." *2012 Detention Guidelines* ¶¶ 1, 12. An individual's status as an asylum-seeker is not, by itself, a legitimate reason justifying the use of detention. *Id.* ¶ 32. Seeking asylum is not an unlawful act and thus cannot justify detention. *Id.* ¶ 2; *see also* U.N. Working Group on Arbitrary Detention (WGAD), *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court* ¶ 116, U.N. Doc. A/HRC/30/37 (July 6, 2015) [hereinafter "*Basic Principles and Guidelines*"] ("[T]here is a right to seek asylum under international law and . . . , given that it is neither an unlawful nor a criminal act, it cannot be invoked as grounds for their detention.").

In light of these principles, and taking into account Article 31 of the *1951 Convention* (which prohibits penalizing refugees on account of irregular entry), "detention of asylum-seekers should normally be avoided and be a measure of last resort." *2012 Detention Guidelines* ¶ 2; *see also id.* ¶ 14 (stating that "liberty" should be "the default position").[7] Other international bodies have recog-

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for the proposition that indefinite detention violates international law).

[7] In *Demore* v. *Kim*, 538 U.S. 510 (2003), this Court stated that, "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Id.* at 528. That statement does not bear on the legality of the Government's right to detain *asylum-seekers*. Under international law, as implemented in the Refugee Act, States cannot

nized that detention of asylum-seekers should be the exception and not the rule. *See, e.g.*, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 2013 O.J. (L 180) 96, 97 [hereinafter "E.U. Directive"] (providing that asylum applicants "may be detained only under very clearly defined exceptional circumstances"); Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process* ¶ 416 (Dec. 30, 2010) ("[D]etention should be the exception.").

2. UNHCR understands that States face an "array of contemporary challenges to national asylum systems" and that each State may rightfully "control the entry and stay of non-nationals on their territory." *2012 Detention Guidelines* ¶ 1. Such control is nevertheless "subject to refugee and human rights standards." *Id.* Those standards include the international law prohibition against arbitrary detention of asylum-seekers. *Id.* ¶ 18.

As an initial matter, detention of asylum-seekers must have "a legitimate purpose." *2012 Detention Guidelines* ¶ 21. "[T]here are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely public order, public health or national security." *Id.* (emphasis omitted); *see also id.* ¶¶ 22–30. Use of detention for other purposes is arbitrary, "even if entry was illegal." *Id.* ¶¶ 21, 31. Imposing detention "to dissuade those who have

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"expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *1951 Convention* art. 33, ¶ 1; *see* 8 U.S.C. § 1231(b)(3).

commenced their claims from pursuing them," or to deter others from seeking asylum, is unlawful. *Id.* ¶ 32.

In addition, a State must always determine whether detention is necessary, reasonable, and proportionate "in each individual case." *2012 Detention Guidelines* ¶ 34; *see also* WGAD, Deliberation No. 9, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012); *A* v. *Australia*, U.N.H.R.C., U.N. Doc. CCPR/C/59/D/560/1993, ¶ 9.2 (Apr. 30, 1997) (stating, in a case involving prolonged detention of an asylum-seeker, that "the notion of 'arbitrariness'" must "be interpreted more broadly to include such elements as inappropriateness and injustice"). The necessity of detention is determined "in light of [its] purpose," and State authorities cannot act beyond what "is strictly necessary to achieve the pursued purpose in the individual case." *2012 Detention Guidelines* ¶ 34. Reasonableness "requir[es] an assessment of any special needs or considerations in the individual's case." *Id.* The "principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights." *Id.*

The principles of necessity, reasonableness, and proportionality require that a detention decision "be based on an assessment of the individual's particular circumstances." *2012 Detention Guidelines* 15 (Guideline 4). As a result, "[m]andatory or automatic detention" of asylum-seekers is per se arbitrary. *Id.* ¶ 20. "It has been widely held that mandatory or non-reviewable detention of refugees and asylum-seekers is incompatible with international law." UNHCR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons* ¶ 5 (2011) [hereinafter "*Global*

Roundtable"]; *see, e.g.*, *Velez Loor* v. *Panama*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171 (Nov. 23, 2010) ("[M]igratory policies based on the mandatory detention of irregular migrants, without ordering the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures to achieve the same ends, are arbitrary."); *C* v. *Australia*, U.N.H.R.C., U.N. Doc. CCPR/C/76/D/900/1999, ¶ 8.2 (Nov. 13, 2002) (concluding that "continuance of immigration detention for over two years without individual justification" was arbitrary); *A* v. *Australia*, U.N.H.R.C., ¶ 9.4 (finding that detention of an asylum-seeker was arbitrary because the State failed to advance "any grounds particular" to his case).[8]

3. States have tools, including alternatives to detention, with which to balance asylum-seekers' right to liberty and States' legitimate interests in appropriate cases. "The consideration of alternatives to detention . . . is part of an overall assessment of the necessity, reasonableness and proportionality of detention . . . ." *2012 Detention Guidelines* ¶ 35 (emphasis omitted). "[D]etention can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective pursued by detention, such as national security or public order." *Global Roundtable* ¶ 3; *see also* G.A. Res. 63/184, Protec-

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[8] The U.N. Human Rights Committee has expressed concern that the United States' practice of subjecting migrants to "mandatory detention . . . for prolonged periods of time without regard to the individual case may raise issues under article 9 of the [ICCPR]." U.N. Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America* ¶ 15, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

tion of Migrants ¶ 9 (Dec. 18, 2008); UNHCR, *Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants and Stateless Persons* 2 (2012). Consideration of alternative measures "ensures that detention of asylum-seekers is a measure of last, rather than first, resort." *2012 Detention Guidelines* ¶ 35; *see also C* v. *Australia*, U.N.H.R.C., ¶ 8.2. Accordingly, even in cases where some restriction on liberty is justified, a State must consider whether alternatives to detention are sufficient to achieve the State's goal. Of course, alternatives to detention that restrict an asylum-seeker's liberty are subject to the same human rights standards discussed herein. *See 2012 Detention Guidelines* ¶¶ 36–37.

Alternatives to detention can take many forms, including bond or bail, reporting conditions, registration or deposit of documents, community supervision, electronic monitoring, or home curfew. *Global Roundtable* ¶ 20; *see also 2012 Detention Guidelines* Annex A.[9] Such alternatives are "considerably less expensive than detention." *Global Roundtable* ¶ 17. Research has shown that when people are released under proper supervision, a 90 percent compliance rate can be achieved. *Id.* ¶ 16. The U.S. Government's experience with alternatives to detention also has shown them to be effective.[10]

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[9] When States impose bond or bail requirements, "[t]he bond amount set must be reasonable given the particular situation of asylum-seekers, and should not be so high as to render bail systems merely theoretical." *2012 Detention Guidelines*, Annex A ¶ vi. "Systematically requiring asylum-seekers to pay a bond and/or to designate a guarantor/surety, with any failure to be able to do so resulting in detention (or its continuation), would suggest that the system is arbitrary and not tailored to individual circumstances." *Id.*

[10] As the Ninth Circuit recognized, the Department of Homeland Security has operated an alternatives-to-detention program since

B. Review by an Independent Decision-Maker Is Necessary To Ensure That Detention Is Not Arbitrary

Critically here, international law requires States to conduct independent review of the necessity, reasonableness, and proportionality of detention of asylum-seekers. The right to challenge one's detention "is a self-standing human right" that is "widely recognized in international and regional human rights instruments." *Basic Principles and Guidelines* ¶¶ 1–2. Under the ICCPR, "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR art. 9, ¶ 4. The General Assembly has embraced the principle that a detained person "shall be entitled at any time to take proceedings . . . before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay." G.A. Res. 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32 ¶ 1 (Dec. 9, 1988). Regional human rights instruments uniformly recognize this core human right. *See* U.N. Special Rapporteur on the Human Rights of Migrants, *2012 Report of the Special Rapporteur* ¶ 19,

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2004. Pet. App. 55a. According to a 2015 report of the Department's Inspector General, U.S. Immigration and Customs Enforcement has found that the program is "effective because, using its performance metrics, few program participants abscond." U.S. Department of Homeland Security, Office of the Inspector General, OIG-15-22, *U.S. Immigration and Custom Enforcement's Alternatives to Detention (Revised)* 2 (Feb. 4, 2015). The record in this case confirms that finding. *See* Resps.' Br. 40.

U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) [hereinafter "*2012 Report of the Special Rapporteur*"].

The U.N. Human Rights Committee has affirmed that this principle applies to asylum-seekers. *See* UN-HRC General Comment No. 35 ¶ 18. Under international law, an asylum-seeker has the right "to be brought promptly before a judicial or other independent authority to have the detention decision reviewed" for necessity, reasonableness, and proportionality. *2012 Detention Guidelines* ¶ 47(iii), (v). "The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release." *Id.* ¶ 47(iii); *see also Shams* v. *Australia*, U.N.H.-R.C., U.N. Doc. CCPR/C/90/D/1255, ¶ 7.3 (Sept. 11, 2007) (holding that a court's review of detention must include an assessment of whether detention violates the international law prohibition on arbitrary detention and must include the possibility of release); *Basic Principles and Guidelines*, Annex ¶ 42. As discussed in more detail below, independent review of detention must occur automatically; although the right to seek habeas relief must be respected, the availability of such relief does not adequately safeguard asylum-seekers' fundamental right to avoid arbitrary detention. *See infra* Parts III.A, III.B.

International jurisprudence and practice support the right to independent review of the decision to detain. The European Court of Human Rights has repeatedly found that detention of asylum-seekers without providing access to speedy and effective judicial review violates the right to liberty under article 5 of the European Convention on Human Rights. *See Suso Musa* v. *Malta*, Eur. Ct. H.R., App. No. 42337/12, ¶ 60 (2013); *Abdolkhani* v. *Turkey*, Eur. Ct. H.R., App. No. 30471/08, ¶ 142 (2009). The Inter-American Court of Human Rights has reached the same

conclusion with respect to migrants generally. *See Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Inter-Am. Ct. H.R. Advisory Op. OC-21/14, ¶¶ 191–198 (Aug. 13, 2014) (stating that detained migrants "must be brought promptly before a judge or other official authorized [by] law to exercise judicial functions"); *Dorzema* v. *Dominican Rep.*, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 140 (Oct. 24, 2012) (stating that the "authority that must decide the legality of the arrest or detention must be a judge or court" (internal quotation marks omitted)). And the practice of other States is to provide asylum-seekers the right to independent review of the legality of detention. *See, e.g.*, E.U. Directive art. 9, ¶ 3 ("Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention . . . ."); Immigration Act 2009 No. 51, §§ 313, 316 (Nov. 16, 2009) (May 6, 2016 reprint) (N.Z.); Federal Act on Foreign Nationals, Dec. 16, 2005, art. 80 (amended) (Switz.).

Failure to provide independent review of the legality of detention produces unacceptable risks of prolonged, arbitrary detention of persons entitled to protection as refugees. In this case, for instance, the court of appeals found that "[c]lass members spend, on average, 404 days in immigration detention," and that "[n]early half are detained for more than one year, one in five for more than eighteen months, and one in ten for more than two years." Pet. App. 18a–19a. During this time, they are "treated much like criminals serving time," even though many class members have no criminal records and the class members with previous criminal convictions have already served their sentenced terms of imprisonment. *Id.* at 20a. Perversely, "[n]on-citizens who vigorously pursue claims for relief from removal," such as asylum-seekers, "face

substantially longer detention periods than those who concede removability." *Id.* at 19a. As one example, in *Nadarajah* v. *Gonzales*, 443 F.3d 1069 (9th Cir. 2006), an asylum-seeker was detained under Section 1225(b) for more than four years while twice defending the Government's appeal of the immigration judge's grant of asylum. Absent review by an independent decision-maker, detention threatens to punish asylum-seekers for pursuing their claims, in contravention of Article 31 of the *1951 Convention*.

C. International Law Precludes the Notion That Asylum-Seekers Detained at the Border Have Fewer Rights than Asylum-Seekers Detained After Entry

International law does not countenance the fiction, advanced by the Government here, that asylum-seekers detained at the border have fewer rights than persons detained after entry into the United States. *See* Petrs.' Br. 19–20. The Government largely bases this argument on this Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). *Mezei*, however, did not involve a refugee or asylum-seeker and was decided before the United States bound itself to the *1967 Protocol* and the ICCPR. It therefore does not govern the legality of detention of asylum-seekers detained at the border.

It is a fundamental tenet of human rights law that the liberty of *all* persons, regardless of status, must be protected: the ICCPR provides that the right to avoid arbitrary detention applies to "all individuals within [a State's] territory and subject to its jurisdiction." ICCPR art. 2, ¶ 1; *id.* art. 9; *see also* UDHR art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile."); *2012 Detention Guidelines* ¶ 12. As Justice Kennedy has recognized, "[i]nternational views on detention of refugees and

asylum seekers" support the conclusion that "*both* removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) (emphasis added).

The obligation to protect against arbitrary detention applies with full force with respect to asylum-seekers detained at the border under 8 U.S.C. § 1225(b). According to the Government, the purpose of detaining persons under Section 1225(b) is "to ensure that the border actually keeps people out." Petrs.' Br. 21–22. The Government paints the Section 1225(b) subclass members as economic migrants who have come to the United States to take American jobs. *See id.* at 23. The reality is far different. As discussed above, the "overwhelming majority" of the Section 1225(b) subclass in this case are asylum-seekers who have previously established a credible fear of persecution—a large majority of whom ultimately were granted relief. *See supra* p.12. International law prohibits the United States from detaining these individuals for the purpose of ensuring "that the border actually keeps [such individuals] out." Petrs.' Br. 21–22. As discussed above, "[d]etention that is imposed in order to deter future asylum-seekers . . . is inconsistent with international norms." *2012 Detention Guidelines* ¶ 32.

UNHCR understands that governments often "know very little" about persons arriving at the border. Petrs.' Br. 23. Under international law, "[m]inimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks." *2012 Detention Guidelines* ¶ 24; *see also* UNHRC General Comment No. 35 ¶ 18; *F.K.A.G.* v. *Australia*, U.N.H.R.C., U.N. Doc. CCPR/C/108/D/2094/2011, ¶ 9.3 (Aug. 20, 2013). The need to establish identity or conduct security

checks, however, does not justify the periods of prolonged detention at issue in this case. To avoid characterization of detention as arbitrary, "detention should not continue beyond the period for which a State party can provide appropriate justification." *Bakhtiyari* v. *Australia*, U.N.H.R.C., U.N. Doc. CCPR/C/79/D/1069/2002, ¶¶ 9.2, 9.3 (Nov. 6, 2003); *see also 2012 Detention Guidelines* ¶ 24.

Fundamentally, all asylum-seekers are entitled to independent review of the legality of their detention, "[r]egardless of the name given to a particular place of detention." *2012 Detention Guidelines* ¶ 7; *see also* ICCPR art. 9, ¶ 4 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court . . . ."). The European Court of Human Rights recognized this principle in holding that France was required to provide asylum-seekers with judicial review of their detention in the arrivals area of Paris-Orly Airport. *See Amuur* v. *France*, Eur. Ct. H.R., App. No. 19776/92, ¶¶ 52–54 (1996); *see also Riad* v. *Belgium*, Eur. Ct. H.R., App. Nos. 29787/03, 29810/03, ¶ 68 (2008).[11] Under international law, asylum-seekers detained at the U.S. border are entitled to review of their detention by an independent decision-maker.

III. The Procedural Aspects of the Court of Appeals' Ruling Are Consistent with International Law Governing Detention of Asylum-Seekers

The *2012 Detention Guidelines* provide support for the procedural safeguards required by the court of appeals. "Decisions to detain or to extend detention must be

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[11] France was later deemed to be in compliance with the protections required by *Amuur* because, under subsequently enacted French law, "detention [of persons detained at the border] beyond four and twelve days requires judicial authorisation." Council of Europe, Committee of Ministers, Res. No. DH (98) 307 (June 25, 1996).

subject to minimum procedural safeguards." *2012 Detention Guidelines* 27 (Guideline 7). Although states may employ different models for providing review, the right to challenge the arbitrariness of detention should be guaranteed in law and practice. *Basic Principles and Guidelines* ¶ 13. The procedures required by international law include those at issue in this case: (1) the requirement that the State bear the burden to demonstrate the lawfulness of detention; (2) the automatic provision of periodic bond hearings; and (3) the requirement that immigration judges consider the accrued length of detention in deciding whether to release an individual. *See* Pet. App. 52a–53a, 56a–58a. Absent such protections, detention of refugees is arbitrary under international law.

A. The Government Must Bear the Burden of Demonstrating the Lawfulness of Detention

As a matter of international law, the burden to justify detention of an asylum-seeker must fall on the Government. As already discussed, "detention of asylum-seekers should be a measure of last resort, with liberty being the default position." *2012 Detention Guidelines* ¶ 14; *see supra* p.16. Because liberty is the default, the burden of establishing the lawfulness of the detention rests solely with the Government. *See* UNHRC General Comment No. 35 ¶ 15 (construing States' obligations under article 9 of the ICCPR); *2012 Detention Guidelines* ¶¶ 14, 47(v). "[T]he authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case." *2012 Detention Guidelines* ¶ 47(v); *see also Basic Principles and Guidelines*, Annex ¶ 21.

Requiring an asylum-seeker to prove his or her entitlement to release from detention violates these well-established principles.

Because the Government must bear the burden to justify detention, the Government necessarily bears the burden to initiate independent review of an asylum-seeker's detention. Although asylum-seekers must be able "to challenge the lawfulness of detention before a court of law at any time" (for example, through habeas proceedings), the ability to seek such relief is not an adequate substitute for a State's obligation to provide independent review. *See 2012 Detention Guidelines* ¶ 47(v); *Basic Principles and Guidelines*, Annex ¶ 65; *see also* Petrs.' Br. 49–50. Requiring the asylum-seeker to file a habeas petition to obtain review of his or her detention would eviscerate the principle that the State bears the burden to justify the legality of detention. Additionally, as discussed below, detained asylum-seekers often lack access to counsel and/or information about their legal rights, *see infra* Part IV; requiring such individuals to initiate habeas proceedings will inevitably stymie review of the detention of asylum-seekers in many cases. *See 2012 Report of the Special Rapporteur* ¶ 23.

B. Detention Must Be Reviewed Periodically

Requiring periodic bond hearings also comports with international law. After an initial hearing, "regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place." *2012 Detention Guidelines* ¶ 47(iv); *see also 2012 Report of the Special Rapporteur* ¶ 21 (stating that "the decision to keep the person detained must be reviewed periodically"); *Global Roundtable* ¶ 2 (requiring that detention of asylum-seekers be subject to "periodic and judicial review"); *Ahani* v. *Canada*, U.N.H.R.C., U.N. Doc.

CCPR/C/80/D/1051/2002, ¶ 10.2 (June 15, 2004) ("[A]n individual must have appropriate access . . . [to] sufficiently frequent review."); E.U. Directive art. 9, ¶ 5 ("Detention shall be reviewed by a judicial authority at reasonable intervals of time . . . ."). Periodic review is necessary to ensure that, in light of changing circumstances, continuing detention is still justified. *Basic Principles and Guidelines*, Annex ¶ 62; *see, e.g.*, *A* v. *Australia*, U.N.H.R.C., ¶ 9.4 ("[E]very decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.").

Just as the availability of habeas relief does not negate the State's initial obligation to provide independent review, *see supra* Part III.A, it also cannot relieve a State of its obligation to provide regular, periodic reviews. *See 2012 Detention Guidelines* ¶ 47(v); *Basic Principles and Guidelines*, Annex ¶ 65. Periodic review of detention should be conducted automatically. *See 2012 Detention Guidelines* ¶ 47(iv) (requiring "regular periodic reviews"); *2012 Report of the Special Rapporteur* ¶ 23 ("[T]here should be automatic, regular and judicial, not only administrative, review of detention in each individual case . . . .").

In UNHCR's view, good practice is to conduct an initial review within 24 to 48 hours, periodic reviews every 7 days thereafter, and, after one month of detention, periodic reviews every month thereafter until "the maximum period set by law is reached." *2012 Detention Guidelines* ¶ 47(iii), (iv). Other countries require periodic review of the detention of asylum-seekers on comparable timetables. For example, Canada requires review of detention in most cases within 48 hours, again within 7 days thereafter, and then at regular 30-day intervals; such review occurs before an independent administrative tribunal, and

the detained individual has the right to seek judicial review. *See* Immigration and Refugee Protection Act, S.C. 2001, c. 27 §§ 54, 57, 72 (as amended July 1, 2015) (Can.). New Zealand requires judicial review of detention after 96 hours, and in most cases periodic review every 28 days thereafter. *See* Immigration Act 2009 No. 51, §§ 313, 316 (Nov. 16, 2009) (May 6, 2016 reprint) (N.Z.). These timeframes are, of course, far shorter than those at issue in this case.

C. Judges Must Consider the Accrued Length of Detention in Favor of Granting Release

Requiring immigration judges to consider the accrued length of detention is consistent with the international law principle of proportionality. The length of detention is an obvious factor in determining whether detention is proportionate and therefore legitimate. The Government itself concedes this point, stating that, "because longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely," Petrs.' Br. 47 (citing *Zadvydas*, 533 U.S. at 690, 701). The *2012 Detention Guidelines* expressly provide that "[t]he length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary." *2012 Detention Guidelines* ¶ 44. Accordingly, a decision-maker must always take into account the length of an asylum-seeker's detention in balancing "the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights." *Id.* ¶ 34. The longer detention persists, the more likely it is to be arbitrary.

Under no circumstance may the length of detention continue indefinitely. "Indefinite detention for immigration purposes is arbitrary as a matter of international human rights law." *2012 Detention Guidelines* ¶ 44; *see also* WGAD, Deliberation No. 5 on Situation Regarding Immigrants and Asylum Seekers, Principle 7, U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999); *2012 Report of the Special Rapporteur* ¶ 22; *F.K.A.G.* v. *Australia*, U.N.H.R.C., ¶ 9.4 (holding that detention was arbitrary because asylum-seekers were "deprived of legal safeguards allowing them to challenge their indefinite detention"). This principle further requires that reviewing authorities consider the length of detention in determining whether continued detention is justified.

IV. Prolonged Detention Impedes Access to Asylum and Can Lead to *Refoulement*

As a practical matter, prolonged detention of asylum-seekers absent meaningful review can undermine a State's compliance with basic principles of refugee law.

A. Prolonged Detention Impedes Adjudication of Refugee Claims

The requirement that States provide "fair and efficient procedures for the determination of refugee status" is central to the *1951 Convention* and *1967 Protocol*. UNHCR Exec. Comm., *General Conclusion on International Protection*, No. 71 (XLIV), U.N. Doc. A/48/12/Add.1 (Oct. 8, 1993) [hereinafter "UNHCR Conclusion No. 71"]. Detention can impede full, fair adjudication of valid claims by creating obstacles to obtaining legal counsel. *See* Pet. App. 20a; *see also Global Roundtable* ¶ 8. Detained asylum-seekers are less likely to secure legal representation, in part because they are oftentimes

detained in remote locations. Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices* (Dec. 2004), *in* U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, Vol. II, 232, 239–40 (2005); Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* 44 (2009). And asylum-seekers without legal representation are far less likely to be granted asylum. *See* U.S. Gov't Accountability Office, GAO-08-940, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges* 30 (2008). In addition, detention makes it difficult for asylum-seekers to collect evidence and reference materials, such as country condition reports, in support of their claims. Detention thus diminishes the likelihood that asylum-seekers will be successful in obtaining asylum.

B. Detention Risks *Refoulement*

Prolonged detention further raises concerns about States' compliance with the international law obligation to safeguard the principle of *non-refoulement*. As discussed above, *non-refoulement* is the obligation not to return an individual to any country where he or she faces persecution or a reasonable possibility of serious harm. *See supra* p.6. The *non-refoulement* obligation is at the core of the *1951 Convention* and *1967 Protocol* and, in UNHCR's considered view, "has become a norm of customary international law." UNHCR, *Note on the Principle of Non-Refoulement* (Nov. 1997).

UNHCR's Executive Committee has recognized that unjustified detention seriously jeopardizes the protection of refugees. UNHCR Conclusion No. 71; *see also* UNHCR Conclusion No. 44 (reaffirming "the fundamental

importance of the observance of the principle of non-refoulement" and expressing concern about the large numbers of asylum-seekers subject to detention). As the court of appeals correctly recognized, prolonged detention may result in asylum-seekers abandoning bona fide claims and returning to countries where they fear persecution or torture. *See* Pet. App. 19a. Detention can be especially traumatic for victims of persecution. As a result, some asylum-seekers decide to withdraw their applications and accept deportation, rather than endure lengthy periods of detention while they pursue their claims. *See, e.g.*, Craig Haney, *Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal* (Feb. 2005), *in* U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, Vol. II, 178, 197–98 (2005); Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* 45–46 (2009). Prolonged detention thus increases the chances of *refoulement* for asylum-seekers.

Finally, it bears highlighting that detention of asylum-seekers who declare themselves to authorities at the border worsens an already precarious humanitarian crisis by driving asylum-seekers into the hands of smugglers and human traffickers. As UNHCR has stated:

> In our dialogue with Governments . . . , security concerns often seem to trump humanitarian and protection considerations, but they are not mutually exclusive. We have seen time and again how giving primacy to a security focus at the expense of protection has failed to bring about the desired results, often at great expense to taxpayers. Push-backs, building walls, increasing detention, and further restricting access, combined with few legal avenues to safety, will never be the answer. The

> impact is simply the diversion of refugee movements along other routes and the aggravation of already precarious situations in regions embroiled in conflict. Worse still, these measures compel more people who have nothing left to lose to risk dangerous journeys in the hope of finding eventual safety and stability. This creates an environment in which smuggling and trafficking can thrive.

UNHCR, 66th Sess. of the Exec. Comm. of the High Comm'r's Programme Agenda point 5(a) (Oct. 8, 2015) (statement by Volker Türk, Asst. High Comm'r for Protection).

CONCLUSION

For the foregoing reasons, UNHCR respectfully urges this Court to construe the Immigration and Nationality Act in accordance with the United States' international law obligations to protect asylum-seekers from arbitrary detention.

Respectfully submitted.

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